

Below is an Opinion of the Court.


RANDALL L. DUNN
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF OREGON

In Re:)	Bankruptcy Case
)	No. 04-37320-rld13
Donald Brian Dolph,)	
)	
Debtor.)	
_____)	
Jim J. Schacher,)	Adv. Proc. No. 07-03326-rld
)	
Plaintiff,)	
)	MEMORANDUM OPINION
v.)	(Motion for Reconsideration)
)	
Donald Brian Dolph,)	
)	
Defendant.)	
_____)	

On June 11, 2008, I entered a memorandum opinion ("Opinion") in this adversary proceeding through which I determined, based on the evidence presented at the trial ("Trial") held June 4, 2008, that imposition of a constructive trust on the residence of Defendant, Donald Dolph ("Mr. Dolph"), in the amount of \$1,840.07 was appropriate. The facts of the dispute are set out in detail in the Opinion.

1 Prior to entry of the judgment in the adversary proceeding,
2 Plaintiff, Jim Schacher ("Mr. Schacher"), filed a motion ("Motion") for
3 reconsideration, which appears to relate only to my determination of the
4 amount of the constructive trust based upon distributions Mr. Dolph
5 received from his mother, Patricia Schacher, and her estate. On June 19,
6 2008, I entered a briefing schedule for the Motion. Following the filing
7 of Plaintiff's reply brief ("Reply"), I took the matter under submission.

8 This Memorandum Opinion constitutes my findings of fact and
9 conclusions of law, which I make pursuant to Fed. R. Civ. P. 52(a),
10 applicable in this adversary proceeding pursuant to Fed. R. Bankr. P.
11 7052. I have jurisdiction to enter a final judgment in the adversary
12 proceeding pursuant to 28 U.S.C. §§ 1334, 157(a), 157(b)(1), and
13 157(b)(2)(B) and (O).

14 15 DISCUSSION

16 A. Standards for Deciding a Motion for Reconsideration

17 The Motion asks that I reconsider my decision, as set forth in
18 the Opinion. The standards I must apply in determining whether it is
19 appropriate to grant the Motion are the following:

20 Because the Motion was brought within the 10-day period to
21 appeal from the Opinion, it is "analogous to a motion for new trial or to
22 alter or amend the judgment pursuant to FRCP 59 as incorporated by Rule
23 9023." United Student Funds, Inc. v. Wylie (In re Wylie), 349 B.R. 204,
24 209 (9th Cir. BAP 2006).

25 FRCP 59(a)(2) provides the grounds for granting a new trial:
26

1 A new trial may be granted to all or any of the parties
2 and on all or part of the issues . . . (2) in an action
3 tried without a jury, for any of the reasons for which
rehearings have heretofore been granted in suits in
equity in the courts of the United States

4 The Ninth Circuit has held that "[t]here are three grounds for
5 granting new trials in court-tried actions under Rule 59(a)(2): (1)
6 manifest error of law; (2) manifest error of fact; and (3) newly
7 discovered evidence." Brown v. Wright, 588 F.2d 708, 710 (9th Cir.
8 1978). See also Ankeny v. Meyer (In re Ankeny), 184 B.R. 64, 73 (9th Cir.
9 BAP 1995).

10 Mr. Schacher asserts that he has filed the Motion "to make one
11 final attempt [to] try to get to a logical and fair decision that will
12 both withstand review and put an end to the conflict so no more
13 unnecessary costs will incur in an appeal process by Plaintiff." Mr.
14 Schacher does not articulate whether he considers the Opinion to contain
15 errors of law, errors of fact, or both. Further, he addresses neither
16 the legal standards which entitle him to relief from the Opinion, nor how
17 those standards are met by his Motion. Both the Motion and Mr.
18 Schacher's Reply appear to be nothing more than additional argument with
19 respect to the proper calculation of damages. Nevertheless, I have
20 parsed the text of Mr. Schacher's pleadings in an effort to determine
21 whether his argument meets the standards which would entitle Mr. Schacher
22 to relief from the determinations made in the Opinion.

23
24 B. The Motion Establishes No Basis for Relief From the Opinion

25 As noted above, under Ninth Circuit standards, in order to
26 grant Mr. Schacher relief from the findings included in the Opinion, I

1 must find that the Opinion is based on either a manifest error of law or
2 a manifest error of fact. Alternatively, I must find that Mr. Schacher
3 has newly discovered evidence which he should be allowed to present. I
4 address this alternative first.

5 1. No new evidence has been offered

6 At the conclusion of the presentation of testimony at the
7 Trial, I closed the evidentiary record. At the scheduling hearing I
8 conducted with respect to the Motion, I reminded Mr. Schacher's counsel
9 that the record had been closed. Fed. R. Civ. P. 59 allows a party to
10 request that the evidentiary record be reopened. If such a request were
11 made, under Ninth Circuit standards I would need to evaluate whether any
12 additional evidence offered is "new" evidence that was not available at
13 the time of Trial. Mr. Schacher has not made any such request.
14 Consequently, "newly discovered evidence" does not provide a basis for
15 granting the Motion.

16 2. No "manifest error" of law or fact has been established

17 Immediately prior to the commencement of Trial, I recited on
18 the record a series of tentative rulings based upon my review of the
19 parties' submissions. In my tentative rulings, I stated not only my
20 tentative conclusion of law that interest could not be imposed in favor
21 of Mr. Schacher until the date a constructive trust was judicially
22 imposed, I also gave the parties the benefit of my proposed calculation
23 of the amount of the constructive trust I believed it would be
24 appropriate to impose if the evidence presented did not change. With
25 full knowledge of my tentative damages analysis, Mr. Schacher produced no
26 evidence of damages to suggest that my proposed calculation was not

1 correct. Instead, Mr. Schacher testified, and his counsel emphasized at
2 argument, that the amount of the Patricia Schacher probate estate
3 ("Probate Estate") cannot be ascertained until complete recoveries have
4 been made from Mr. Dolph and his sisters. As noted above, after the
5 presentation of evidence at the Trial, but before closing arguments
6 commenced, I closed the evidentiary record. The Opinion is consistent
7 with my tentative rulings.

8 In the Motion, Mr. Schacher objects to my finding of the amount
9 of the constructive trust I imposed. Mr. Schacher does not argue any
10 manifest error of law. However, there are two components to my
11 calculations to which Mr. Schacher objects. First, Mr. Schacher contends
12 that the amount Mr. Dolph received is not properly determined where I did
13 not factor in the cost to the Probate Estate inherent in the delay in
14 recovering the funds wrongfully received by Mr. Dolph. Second, Mr.
15 Schacher contends it is improper to credit Mr. Dolph for his legitimate
16 share of the Probate Estate, either because that share cannot be
17 determined at this time or, alternatively, because Mr. Dolph has waived
18 that share through his confirmed chapter 13 plan.

19 I address first Mr. Schacher's contention that I incorrectly
20 calculated the amount Mr. Dolph received as a result of improper
21 distributions from his mother and her estate. Mr. Schacher asserts my
22 calculated amount, \$50,591.71,¹ is a minimal calculation of Mr. Dolph's
23

24 ¹The parties agreed at trial that Mr. Dolph received \$75,111.70
25 total, from which Mr. Dolph is entitled to deduct \$10,000 as a credit for
26 the Series EE bond in his name that was recovered by the Probate Estate
and \$14,519.99 as a credit for Mr. Dolph's chapter 13 plan payments ("the
(continued...)

1 unjust enrichment. However, Mr. Schacher contends, this amount is
2 insufficient because it does not return the Probate Estate to the
3 position it would have been in had the transfers to Mr. Dolph not been
4 made. Since the Probate Estate is not entitled to prejudgment interest,
5 a point Mr. Schacher appears to concede, Mr. Schacher proposes that the
6 \$19,000 which Mr. Dolph used to make the down payment on his home be
7 deducted from the \$50,591.71, and in its place, the Probate Estate should
8 receive \$58,495.00, which represents all of the equity which had accrued
9 in the home as of the petition date. Mr. Schacher thus asserts that a
10 lien in the amount of \$89,786.71 should be imposed upon Mr. Dolph's home,
11 calculated as follows:

12	\$50,291.71	net amount received by Mr. Dolph reflecting the
13		Credits and an additional credit of \$300
14		representing expenses Mr. Dolph incurred in moving
15		his mother prior to her death
16	-\$19,000.00	portion of the \$50,291.71 Mr. Dolph used in making
17		the down payment on his home
18		
19	<u>\$31,291.71</u>	
20	+\$58,495.00	equity in Mr. Dolph's home as of the petition date
21		
22	<u>\$89,786.71</u>	

23 In his response to the Motion, Mr. Dolph points out that this
24 proposed calculation is not proper, because it stems from an improper
25 premise. Specifically, the determination the court is to make is not the
26 amount it would take to make the Probate Estate "whole again as much as
possible." Instead, the court is required to determine the amount by
which Mr. Dolph was unjustly enriched, and the amount of any constructive

¹(...continued)
Credits"). The \$50,591.71 amount is calculated by deducting the Credits
from the \$75,111.70 actually received by Mr. Dolph.

1 trust is further limited to the amount of money directly traceable from
2 inappropriate distributions by Patricia Schacher to Mr. Dolph, to Mr.
3 Dolph's home. Mr. Dolph asserts that of the \$19,000 he received from
4 Patricia in 1995, only \$16,269 was used for the purchase of his home:
5 \$11,000 as the down payment and \$5,269 for closing costs and other fees.
6 Mr. Dolph contends that the equity arose not only from his down payment,
7 but also from \$19,600 in additional money he invested into the home in
8 the form of repairs and upgrades, and from thirteen years of mortgage
9 payments he has made. Subtracting out these amounts, estimated to total
10 \$29,600, Mr. Dolph contends there is only \$28,895 equity that could be
11 attributable to the down payment. Further, because the down payment
12 represented only 10.38% of the value of the home at the time of its
13 purchase, any share in the equity that could be asserted by the Probate
14 Estate could not exceed \$2,999.30 (10.38% of \$28,895).

15 As set forth in the Opinion, "[b]ecause it is a remedy, a
16 constructive trust cannot affect rights in the res until it is imposed."
17 Taylor Assoc. v. Diamant (In re Advent Management Corp.), 178 B.R. 480,
18 488 (9th Cir. BAP 1995). For this reason, it is no more appropriate to
19 include in the constructive trust amount a component for appreciation of
20 the real property, than it is to include prepetition interest.
21 Accordingly, I am not persuaded that the finding of the net amount
22 received by Mr. Dolph as stated in the Opinion, i.e., \$50,591.71, is
23 clearly erroneous.

24 Next, I address Mr. Schacher's contention in his Reply that the
25 constructive trust lien should be in the full amount received by Mr.
26 Dolph, less the Credits, without factoring in any offset for Mr. Dolph's

1 legitimate share of the Probate Estate. In making this argument, Mr.
2 Schacher relies on the following provision of Mr. Dolph's confirmed
3 chapter 13 plan:

4 12. The debtor shall abandon any further claim to a
5 distribution from the Estate of Patricia Schacher, and shall
6 use his best efforts to assist the personal representative of
the Estate to close the Estate.

7 I do not agree that this provision precludes Mr. Dolph from asserting, as
8 an offset for purposes of calculating the amount by which he was unjustly
9 enriched, his legitimate share of the Probate Estate. Instead, the
10 provision constitutes a waiver by Mr. Dolph of the right to receive any
11 additional distribution he otherwise might be entitled to receive from
12 the Probate Estate and was included, at my insistence, as a means to
13 facilitate distributions from the Probate Estate for the benefit of the
14 other siblings and step-siblings.

15 Finally, in the Motion, Mr. Schacher objects to the use of a
16 "hypothetical probate asset value" in determining the amount of the
17 credit to be applied against the amount Mr. Dolph actually received. The
18 difficulty for Mr. Schacher in this approach is that I cannot impose a
19 constructive trust in any amount that exceeds the extent to which Mr.
20 Dolph has been unjustly enriched. In order to calculate the amount Mr.
21 Dolph was unjustly enriched, I am required to subtract the amount Mr.
22 Dolph was entitled to receive from the Probate Estate from the amount he
23 actually received.

24 As I stated in the Opinion, the only evidence presented at
25 Trial as to Mr. Dolph's legitimate share of the Probate Estate was set
26 forth in Mr. Schacher's proof of claim. This evidence, submitted by Mr.

1 Schacher, of the value of the Probate Estate may or may not reflect
2 current reality. Having served for five years as the Personal
3 Representative of the Probate Estate, it certainly was within Mr.
4 Schacher's power at the time of Trial to provide evidence either of the
5 current value of the Probate Estate, or a supported estimate of his
6 opinion of the amount he believed would be available for distribution
7 from the Probate Estate. Instead, Mr. Schacher asserted at Trial and
8 continues to assert in the Motion that the Probate Estate value is not
9 ascertainable until the Probate Estate is closed and ready for
10 distribution. If that determination must wait until Mr. Dolph's sisters
11 "pay up," as suggested by Mr. Schacher in his Reply, the Probate Estate
12 value may not be ascertainable during the remaining lives of the parties
13 before me.

14 The burden of proof on this issue was on Mr. Schacher. In
15 making my calculation of unjust enrichment I used the only evidence Mr.
16 Schacher offered on the subject. To the extent Mr. Schacher contends
17 that the amount of the constructive trust should have been greater based
18 on a diminished value of the Probate Estate, I find there was a failure
19 of proof. As a bottom line matter, I find that I did not clearly err in
20 determining the amount of the constructive trust to impose on Mr. Dolph's
21 residence as a matter of equity.

23 CONCLUSION

24 A motion for reconsideration is not an opportunity to retry a
25 matter previously decided. It provides an opportunity to correct
26 "manifest error" or to present "newly discovered" evidence. Mr. Schacher

1 has failed to carry his burden that the calculation of the amount of the
2 constructive trust resulted from manifest error of law or fact. I
3 therefore deny the Motion. A separate form of order will be entered.

4 ###

5 cc: Richard J. Parker
6 Brian Wheeler
7 Brian D. Lynch, Trustee
8 U.S. Trustee
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